

REGISTERED SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
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Mumbai- 400 005

F. No. 373/429/DBK/14-RA / 5280 Date of Issue : 17.09.2021

ORDER NO. 2-23/2021-CUS (SZ)/ASRA/MUMBAI DATED 13.09.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order in Appeal No. 098/2014-TTN(CUS) dated 25.08.2014 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli.

Applicant : M/s. Indian Potash Limited, Chennai.

Respondent : The Commissioner of Customs, Tuticorin.

ORDER

This Revision Application has been filed by M/s. Indian Potash Limited, Chennai (hereinafter referred to as "the applicant") against the Order in Appeal No. 098/2014-TTN(CUS) dated 25.08.2014 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli.

2. The brief facts of the case are that the applicant had filed an application dated 25.11.2013, requesting for sanction of drawback of Rs. 5,29,463/- being the Customs duty paid on Muriate of Potash (in short MOP) exported to Srilanka. The adjudicating authority vide letter/Order C.No. VIII/20/2178/2013-DBK dated 10.12.2013 held that drawback is not applicable to this case as the filing of Shipping Bill and examination of goods are not made under Section 74 of the Customs Act, 1962.

3. Being aggrieved by the aforesaid order, the applicant filed appeal before Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli who vide Order in Appeal No. 098/2014-TTN(CUS) dated 25.08.2014 (impugned Order) rejected the appeal filed by the applicant and upheld letter C.No. VIII/20/2178/2013-DBK dated 10.12.2013.

4. Being aggrieved by the impugned Order the applicant has filed the present Revision Application on the various grounds mentioned therein.

5. A personal hearing in this case was held on 25.03.2021 through video conferencing which was attended online by Shri Harish Bindumadhavan, Advocate, Ms. Ashwini Chandrasekharan, Adv., Mr. L Sayee Mohan, Consultant and Ms. Rakhee Jain, Consultant on behalf of the applicant and reiterated the submissions. They submitted that they have exported duty paid MOP to Sri Lanka and they should be sanctioned drawback. They requested week's time to submit additional submissions and filed the same vide letter dated 01.04.2021.

6. In their additional submissions dated 01.04.2021, the applicant contended as under:-

6.1 The issue involved in the present case is whether they are entitled to claim the benefit of drawback as per Section 74 of the Act on re-export of Muriate of Potash (MOP) imported by them in June 2013.

6.2 In the present, they imported 40,000 MT of MOP in June 2013 which was split into two parts, viz. (a) 33,900 MT was duty paid and cleared for storage in the Warehouses 1 to 4 in the port area and (b) 6100 MT cleared and stored in the Bonded warehouse under Public bonded Warehouse Licence No.04/2013 in

anticipation of export to Sri Lanka. The MOP stored in the bonded warehouse was exported to Sri Lanka by September 2013. However, subsequently, they received a request for export of a further quantity of 349 MT of MOP to Sri Lanka in the second fortnight of September 2013.

6.3 That in order to fulfil the export, they decided to re-export 349 MT of MOP from the duty paid MOP stored in warehouse no. 4. Accordingly, they, vide letter dated September 13, 2013, through their Custom House Agent/ Freight Forwarding Company, intimated the Additional Commissioner of Customs that the cargo of 349 MT of MOP was to be exported from and out of duty paid quantity cleared vide Bill of Entry No.2383512 dated 11.6.2013 and stored in warehouse no. 4 and also requested for permission to file shipping bill under Section 74 of the Act for the export of said 349 MT of MOP. However, Assistant Commissioner of Customs (Drawback), on receipt of the letter from the Additional Commissioner, vide a noting of the said letter rejected their request on the ground that there is "no practical scientific way to establish the identity of export of the goods and goods being exported".

6.4 That due to the urgency of export, they, vide letter dated September 16, 2013, through their Custom House Agent/ Freight Forwarding Company, requested the Assistant Commissioner of Customs to deploy an officer and allow them to file shipping bill under Section 74 of the Act and to stuff the cargo of MOP under Customs Supervision and the sealing in the warehouse. Thus, they, at all times, had diligently informed the Department and requested for permission to file the shipping bill under S. 74 of the Act. However, no response whatsoever was received by the Applicant.

6.5 That due to the urgency, they re-exported the goods under a free shipping bill and thereafter, filed a claim for drawback on November 25, 2013, with the Assistant Commissioner (Drawback). Their claim was rejected by the Ld. Assistant Commissioner vide Order-in-Original dated December 10, 2013 ("OIO"), merely on the procedural lapse that Shipping bill and examination of goods was not made under Section 74.

6.6 That against the said OIO, they filed an appeal with the Ld. Commissioner (Appeals) wherein vide the Impugned Order dated August 25, 2014, the Ld. Commissioner (Appeals) upheld the OIO and consequently rejected their drawback claim.

6.7 The rejection of appeal filed by them is wholly arbitrary, illegal and perverse as the same has been passed without appreciating that the documentary evidence to prove beyond doubt that the goods re-exported by them were duty paid goods that were imported and stored in their warehouse no. 4.

6.8 The events leading to the filing of the present application and the documents submitted by them are summarized in the table below for ease of reference. (The applicant has submitted a tabular chart showing Date/month wise unfolding of events from June 2012 till the filing of present Revision application).

6.9 The Impugned Order passed by the Ld. Commissioner (Appeals) is arbitrary and illegal. That the Ld. Commissioner (Appeals) while holding that the goods have not been exported under drawback shipping bill and that there was no declaration,

has failed to appreciate that the said requirements are merely procedural in nature and cannot be taken as a ground to deny the benefit of drawback when the goods have been re-exported.

6.10 As per S. 74 of the Customs Act, in case goods are imported into India post payment of duty and are later exported, 98% of duty paid on such is available as drawback, In the present case, the MOP imported by them have been re-exported to Sri Lanka, which is evident from the various documents placed on record. Thus, once the goods are re-exported, the denial of credit merely for non-filing of drawback shipping bill and declaration is incorrect and unsustainable.

6.11 It is now a trite law that the procedural infraction of are to be condoned if exports have really taken place, and the law is settled now that substantive benefit cannot be denied for procedural lapses. Such a view has been taken in Birla VXL - 1998 (99) E.L.T. 387 (Tri.), Alfa Garments -1996 (86) E.L.T. 600 (Tri), Alma Tube - 1998 (103) E.L.T. 270, Creative Mobous 2003 (58) RLT 111 (GOI), Ikea Trading India Ltd. -2003 (157) E.L.T. 359 (GOI), and a host of other decisions on this issue.

6.12 The Apex Court in the case of Sambaji v. Gangabai - 2009 (240) ELT 161 (SC) held that procedural law is not to be a tyrant but a servant, not an obstruction but an aid of justice.

6.13 That on similar facts, the Tribunal in the the case of M/s. Modi Revlon Vs. Commissioner of Customs (Import), Mumbai [2007 (209) E.L.T.252 (Tri. Mumbai)] held as follows; (the applicant has re-produced para No. 4 of the said Order).

The above case is mutatis mutandis applicable to the given where they have filed free shipping bills after denial of request to file drawback shipping bills by the Department but has given sufficient proof with respect to duty payment of imported goods and its subsequent export.They also place reliance on below judgment passed by Revisionary authorities, Department of Revenue which constantly emphasizes that substantial benefit of rebate should not be denied due to any procedural irregularity.

1. 2006(204) E.L.T. 632 (G.O.I.) Modern Process Printers;
2. 1999(111) E.L.T. 295(G.O.I.) Allanason Ltd.;
3. 2006(203)E.L.T.321(G.O.I.) Barot Exports;
4. 2001(131)E.L.T. 726 (G.O.I) Krishna Filament Ltd.;
5. 2003 (157) E.L.T.359(G.O.I.) Ikea Trading (India) Ltd.;
6. 2006(200) E.L.T. 171(G.O.I.) Harison Chemicals.

The applicant has also in detail given the Grounds of rejection of rebate in the aforementioned cases and also judgement elucidating reasons for allowing rebate in each of these 6 cases by the GOI.

6.14 The Ld. Commissioner (Appeals) while holding that the Applicant has failed to establish identity of exported goods has completely disregarded the stock statements, the BOE's, CCI certificate etc. which sufficiently prove that goods that were imported and cleared form home consumption after payment of duty were re-exported by them. It is relevant to note that vide Circular No. 46/2011-Cus., dated 20-10-2011, the CBEC clarified that the identity of the goods may be established even with documentary evidences vis-a-vis import documents etc. In the present

case, the stock statement and the export related documents prove beyond doubt that the applicant has re-exported the duty paid MOP. Thus, the denial of drawback on the ground that they have failed to establish the identity of the goods is wholly untenable.

Based on the above submissions, the applicant prayed to allow the claim of drawback on the goods by them and pass any further orders as may deem fit in the facts and circumstances of this case.

7. In response to the grounds of the Revision Application, the respondent department vide letter F.No. VIII/28/47/2015-Review dated 02.02.2015 submitted cross objections / parawise comments mainly contending therein as under :-

- The Assistant Commissioner (Export) has categorically mentioned in the Shipper's (CHA) Letter dated 13.09.2013 that "No practical /scientific way to establish the identity of imported goods being exported". The filing of Shipping Bills and the Examination of the goods are not made under Section 74 (i) of Customs Act, 1962. Hence claiming of Drawback under the provisions of Custom Act is not applicable and returned the connected documents to the shipper.
- As per the Board's Circular No.6/2002, examination norms, for Free Shipping Bill, marks and numbers only to be verified and there is no examination as stated by the Appellant. Hence, the Appellant's contention that fertilizer imported in bulk bagged in 50 kg bags and have a detailed stock account is not relevant to a Free Shipping Bill. For a Free Shipping Bill, there is necessity to verify the export goods from the duty paid or non duty paid stock.
- On perusal of the documents submitted by the Appellant, it was found that the filing of Shipping Bill and examination of the goods are not made under Sec.74 of Customs Act 1962. Hence the drawback under the above provision of Custom Act is not applicable to this case. Hence the Exporter/Appellant's request was rejected.
- Under the Section Section 74 of the Customs Act, 1962 to avail duty drawback it is necessary to export the goods on a drawback shipping bill as per the procedure prescribed. In the present case, admittedly, the goods were not re-exported under the drawback shipping bills but the same was re- exported under a free shipping NO. If the MOP was exported under the drawback shipping bill, the appellants were bound to fill up the prescribed form under section 74 of Customs Act 1962 and make a declaration of its contents to the proper officer, the same was to be verified by the Assistant Commissioner. In the free shipping bill there being no such conditions and marks and numbers only verified
- The appellant/Exporter has admitted the fact that the fertilizer imported in bulk quantity and bagged in 50 kg bags and stored in warehouse and cleared under Bill of Entry No.2383512 dtd. 11.6.2013 after payment of duty and exported the same under "Free Shipping Bill. This was not disputed by

him. Hence the Board's Circular No.46/2011-Cus dated 20.10.2011 is not applicable in this case. Further the Appellant/Exporter has not applied the drawback claim under Sec 74 of the act ibid in a prescribed form and hence his claim was rejected by the Asst. Commissioner.

- The Appellant/Exporter has merely sent a letter by enclosing the documents which are not substantiated the claim under sec.74 of the act ibid for re-exported the said imported goods.
- The Case laws cited by the appellant are not applicable for this case.
- In the case of Kanubhaai Engineers Ltd. Vs. Union of India, on 1st Sept. 2003, the Hon'ble Bombay High Court held that the requisite conditions set out under Sec.76 of the Customs Act 1962 has not complied with , the claim for drawback has been rightly rejected..." In light of the above case, the claim was rejected by the Department.

In view of the above, it was prayed to reject the application filed by the applicant and to uphold the Order-in-Original of the lower authority.

8. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the Order-in-Original and impugned Order-in-Appeal.

9. Government observes that there was a delay of 10 days in filing the present Revision Application by the applicant. The applicant in its Application for condonation of delay submitted that The Applicant submits that they could not file the appeal against the impugned order with in the time limit of three months, as there was a delay in getting the revision application papers prepared for filing before the Hon'ble Revisionary Authority. Even though the draft revision application was received from the counsel of the applicant in time , the concerned personnel viz., the Deputy Manager (Port Operations) who is well conversant with the case and who has to get the papers ready for filing the revision application, fell sick and was on leave during the period from 28.10.2014 to 30.11.2014. Because of his leave of absence, the revision application and the various annexures could not be got ready. It was only after the concerned personnel joined office on 1st December 2014 on return from his leave that necessary papers could be gathered and the revision application could be filed on 11.12.2014. The applicant also attached affidavit filed by the Deputy Manager (Port Operations). In view of this sudden illness of the concerned personnel, the applicant requested for condonation of delay of 10 days in filing the Revision Application. Since, the applicant filed this revision application 10 days after the initial 90 days period, which falls within condonable limit of 90 days and the grounds for seeking condonation of delay by the applicant before the Commissioner (Appeals) are reasonable and justifiable,

Government in the interest of justice condones the said delay and proceeds to examine the case on merits.

10. Government observes that while upholding the Letter dated 1.12.2013 of Assistant Commissioner (DBK), rejecting the drawback claim of the applicant, the Commissioner (Appeals) in his Order observed as under:

As per records no Drawback / Shipping Bills of re-export of duty paid "MOP" under Section 74 of Customs Act, 1962 by the appellants has been filed / received or found place or also such request of the appellants for re-export has not been rejected by the Department. Further the appellants have filed only the Free Shipping Bills for their clearance. As per Board's Circular No. 06/2002-Cus dated 23.01.2002 if the goods are exported under Free Shipping Bills only marks and numbers of the consignment to be verified and there is no detailed examination or physical stocks accounts verification of the said duty paid export goods be done in the normal course of clearance. Further it was found that the filing of Shipping Bill and examination of the goods are not made under Section 74 of Custom Act, 1962. The Section 74 of Customs Act 1962 provides for Drawback if goods arose-exported as such. The re-exported goods should be identifiable as having been imported and should be re-exported within the prescribed period. To establish the identify of goods the original import documents under which the goods were imported should be produced. After inspection, export and submission of application with full details the Drawback is to be considered. The Section 74 is applicable where imported goods are re-exported as it is and article is easily identifiable, failing which the benefit of said provision is not applicable. In the case in hand the appellant failed to establish the identity of imported goods hence their claim under Section 74 of Customs Act 1962 is not supported by evidence so remains unsubstantiated. Hon'ble High Court, Delhi in H.S.Mehra-Vs-UOI [AIR-1968-Dep-H.C.-142] has held that identity of goods must be established. The same very goods must be exported. Similarly M/s.Semi conductor Complex Ltd [In-Re-(2011)271-ELT-466(GOI)] it was held that if identity of goods re-exported cannot be established, Drawback is not allowable. Similar in view in M/s.Shasun Chemicals [In-Re-(2012)277-ELT-409(GOI)]. In view of above fact and circumstances the appellant case devoid of merits. The GOI in the case of CC Vs Kanubahi Engineering Ltd, reported in [1992(59)ELT 502 (G.O.I.)] has held that " goods re-exported on the Shipping Bill and no drawback claim can be entertained under Section 74 of Customs Act, 1962" . The ratio of above judgments is squarely applicable to this case. Hence the drawback under the above provision of Custom Act is not applicable to this case. Under Customs Act, to avail duty drawback, it is necessary to export the goods on a drawback Shipping Bill as per the procedure prescribed. In the present case, admittedly the MOP were not re-exported under the drawback Shipping Bills but the same was re-exported under a free Shipping Bill. The appellants were bound to fill up the prescribed form under Section 74 of Custom Act, 1962 and makes a declaration of its contents to the proper officer. Whereas no such declaration was filed by the appellants. In the Free Shipping Bill there being no such conditions to verify in details so marks and numbers only verified. The appellant/exporter has admitted the fact that the fertilizer imported in bulk quantity and bagged in 50 Kg bags and stored in warehouse and cleared under X-bond Bill of

entry No.2383513 dated 11.06.13 and exported the same under "Free Shipping Bill". This was not disputed by the appellant, Hence the Boards' Circular No. 46/2011-Cus dated 20.10.2011 is not available to the appellant. The other arguments and case laws put forth by the appellants do not come to their help as they have no relevance to this case in hand. In view of foregoing there is no reason to interfere with the subject OIO.

11. Hence, the reasons for the rejection of drawback of the applicant in this case was that the applicant did not fill up prescribed form under Section 74 of Custom Act, 1962 and make a declaration of its contents to the proper officer and instead filed a free Shipping Bill due to which the goods were not examined under Section 74 of Custom Act, 1962. It is the contention of the applicant that before re-export of the imported goods, they vide letter dated 13.09.2013 had duly informed the Additional Commissioner (Customs) Tuticorin, through their CHA about the export shipment of 349MT of MOP to Colombo which was imported from Israel and was cleared under Customs Duty B.E. No. 2383512 dated 11.06.2013 and sought to file the Shipping Bill under Section 74 for the export of said cargo under Drawback Scheme. However, the department on the said letter remarked "*No practical, scientific way to estt. the identity of imported goods being exported*"; that due to the urgency, they re-exported the goods under a free shipping bill and thereafter, filed a claim for drawback on November 25, 2013, with the Assistant Commissioner (Drawback); that their claim was rejected by the Ld. Assistant Commissioner vide Order-in-Original dated December 10, 2013 ("OIO"), merely on the procedural lapse that Shipping bill and examination of goods was not made under Section 74.

12. Government observes that Section 74 of the Customs Act, 1962 which expressly provide for drawback of duty paid on import of goods only in cases where the goods are identified to the satisfaction of the Assistant Commissioner or Deputy Commissioner of Customs. Since, the applicant filed Free Shipping Bills, therefore, there had been no verification/examination of the goods as required under Section 74 of the Act in order to establish that goods exported were the same as the goods imported.

13. Rule 4 of Re-Export of Imported Goods (Drawback of Customs Duties) Rules, 1995 read as follows :

"4. Statements/Declarations to be made on exports other than by post. - In the case of exports other than by post, the exporter shall at the time of export of the goods -

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback under section 74 and make a declaration on the relevant shipping bill or bill of export that -

(i) the export is being made under a claim for drawback under section 74 of the Customs Act;

- (ii) *that the duties of customs were paid on the goods imported;*
- (iii) *that the goods imported were not taken into use after importation; or*
- (iii) *that the goods were taken in use.*

Provided that if the Commissioner of Customs is satisfied that the exporter or his authorized agent has, for reasons beyond his control, failed to comply with the provisions of this clause, he may, after considering the representation, if any, made by such exporter or his authorized agent, and for reasons to be recorded, exempt such exporter or his authorized agent from the provisions of this clause;

(b) furnish to the proper officer of customs, copy of the Bill of Entry or any other prescribed document against which goods were cleared on importation, import invoice, documentary evidence of payment of duty, export invoice and packing list and permission from Reserve Bank of India to re-export the goods, wherever necessary."

14. Government observes that when due to the urgency, the goods were re-exported on free shipping bills instead of required Drawback Shipping Bills, the applicant could have represented to the jurisdictional Commissioner of Customs to allow conversion of said free Shipping Bill into Drawback Shipping Bills subject to compliance of the provisions of Section 74 of the Customs Act, 1962. The powers vested in the Commissioner of Customs under proviso to Rule 4(a) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 (supra) issued under Section 74 of the Customs Act, 1962 are for exercise in such situation after careful consideration of the factual circumstances of each case and thereupon the Commissioner may permit the conversion from free shipping bills to DBK shipping bills after actual/physical export of the imported goods.

15. Therefore, even after re-exporting the goods under free Shipping Bills without examination, the applicant could have applied for conversion of free shipping bill to Drawback Shipping Bills on pre-existing documents which were available at the time of re-export and identity of the product could have been established on the basis of documentary evidence as physical examination could not be done at the time of shipment. The applicant having failed to do so, the respondent authorities were well within their rights in rejecting the drawback claims on the basis of non-examination of such export cargo as the relevant statute stipulates a mandatory condition of goods capable of being easily identifiable to the satisfaction of proper officer. This statutory condition remains unfulfilled in this case. Government observes that the applicant has relied on Tribunal Mumbai's decision in *Modi Revlon Vs. Commissioner of Customs (Import), Mumbai [2007 (209) E.L.T.252 (Tri. Mumbai)]*. However, unlike in the applicant's case, in *Modi Revlon's* case, the goods were examined and there was no dispute that the earlier imported goods were re-exported and it was only a case of wrong filing of shipping

bill. Therefore, said decision would stand distinguished on facts of the present case.

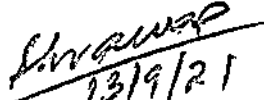
16. Government observes that discretionary powers are not to be applied to those conditions/requirement which otherwise leads to specific consequences. The Customs authorities being creatures of Customs Act cannot ignore the provisions of the statute. These views are in conformity with the views of Hon'ble Supreme Court in below mentioned judgments:

- (i) Sharif-ud-Din v. Abdul Gani Lone - AIR 1980 S.C. 303
- (ii) Eagle Flask Ind. Ltd. v. C.E., Pune - 2004 (171) E.L.T. 296 (S.C.)
- (iii) UOI v. Kirloskar Pneumatics Co. Ltd. - 1996 (84) E.L.T. 401 (S.C.).

In view of the above, the reliance placed by the applicant on various case laws mentioned at para 6.11 & 6.13 supra, which held that substantial benefit of rebate should not be denied due to any procedural irregularity, is misplaced.

17. Government, therefore upholds the Order in Appeal No. 098/2014-TTN(CUS) dated 25.08.2014 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli.

18. The revision application is rejected being devoid of merits.


13/9/21
(SHRAWAN KUMAR)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 223 /2021-CUS(SZ)/ASRA/Mumbai DATED 13.09.2021

To,
M/s. Indian Potash Ltd.
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2. The Commissioner of Customs(Appeals), No. 1, Williams Road, Cantonment, Tiruchirapalli - 620 001
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy